ARTICLE 1904 BINATIONAL PANEL REVIEW

Pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:	)	
Certain Softwood Lumber Products From Canada: Final Affirmative Determination of Sales at Less than Fair Value	)	**Secretariat File No.** **USA-CDA-2017-1904-03**

Panelists*

Daniel B. Pickard (Chairman)

Cindy G. Buys

Maureen Irish

Pierre-Olivier Savoie

Christine M. Streatfeild

*The Panel expresses its appreciation to Panel Assistant Tom Beley.

DECISION AND ORDER

TABLE OF CONTENTS

I. Introduction …… 1

II. Standard of Review ……..... 3

III. Analysis of Panel on Scope 4

A. Legal Standard ……..……..... 6

B. Commerce Lawfully Analyzed the Scope Comments ……..... 7

i. The Policy and Practice Applied by Commerce to Determine Scope Is That It Generally Follows the Scope Proposed by a Petitioner, Which Is in Accordance with Law ……..……... 8

ii. The Consideration of Arguments Put to Commerce Through Reasons Given for the Determination ……...……. 10

iii. Whether the Policy of Deferring to the Scope Proposed by the Petitioner Should be Followed, For Example Because of Administrability, Circumvention, Evasion or Other Relevant Considerations ……. 14

IV. Differential Pricing ……... 17

A. Background …….. 17

i. Dumping and Duty Assessment …… 17

ii. Overview of Arguments …… 19

B. Analysis …… 22

i. The Use of Decisions from the World Trade Organization …….…… 22

ii. The Doctrines of Exhaustion and Waiver ……..... 25

iii. Commerce Methodology and Review by the U.S. Court of Appeals for the Federal Circuit …….. 27

iv. Argument Concerning Seasonality ….……..… 31

V. Commerce Must Reconsider the Deduction of Export Taxes Under the SLA ……. 33

A. The Canadian Parties Properly Raised Claims Regarding the Treatment of SLA Export Taxes in the Proceeding Below; The Doctrine of Exhaustion Does Not Apply …… 34

B. Commerce Misapplied the Statutory Mandate When it Deducted the Export Taxes that Were Paid Under the SLA ……..... 35

i. The Statute Contains Mandatory Language that Governs the Deduction ……. 35

ii. A Remand Is Appropriate for Commerce to Consider the Record Within the Correct Statutory Framework ……... 37

VI. Commerce's Exclusion of Certain Costs Associated with the Permanent Closure and Sale of Complete Production Facilities from Tolko's G&A Expense Calculation Is Supported by Substantial Evidence and Is in Accordance with Law ……. 38

VII. Resolute Specific Issues …… 41

A. Resolute's Startup Adjustments …… 41

i. Background ……..... 41

ii. Analysis …… 43

1. Commerce Reasonably Determined that the Ignace Mill Is Not a New Production Facility…… 45
2. Commerce Must Explain Why Measuring Log Inputs Satisfies the Language of the SAA…….46

B. By-product Offset .....

50

C. G&A Expenses ……..……...…55

i. Resolute Did Not Fail to Exhaust Its Administrative Remedies at Commerce 55

ii. Commerce's Determination to Include in the Calculation of Resolute's G&A Expense Ratio Certain Expenses Incurred by RFP Is Supported by Substantial Evidence and Otherwise in Accordance with the Law ……..... 56

VIII. Order of the Panel……..……..……...…… 58

I. INTRODUCTION

This Binational Panel was appointed pursuant to Article 1904(2) of the North American Free Trade Agreement (NAFTA) and Section 516(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g), to review the Final Affirmative Less Than Fair Value Determination issued by the U.S. Department of Commerce (Commerce) in its antidumping duty (AD) investigation of certain softwood lumber products from Canada.[1]

On December 5, 2017, the Government of Canada (GOC) and other Canadian parties jointly submitted a request for panel review, challenging various elements of the Final Determination. On January 4, 2018, the Committee Overseeing Actions for Lumber International Trade Investigations or Negotiations (COALITION or Petitioner) filed a complaint, challenging two aspects of the Final Determination, one of which it did not proceed with in its briefs and at oral argument.

The GOC claims that Commerce erred in defining the scope of the investigation. We disagree and affirm Commerce's scope findings as supported by substantial evidence and otherwise in accordance with law.

The GOC also claims that Commerce erred in applying the exceptional "average-to-transaction" (A - T) calculation methodology to calculate the weighted-average dumping margins for three respondents: Resolute FP Canada Inc. (Resolute), Tolko Industries, Ltd. (Tolko), and West Fraser Mills Ltd. Separately, Resolute also contests Commerce's differential pricing

[1] *Certain Softwood Lumber Products From Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 Fed. Reg. 51,806 (Dep't Commerce Nov. 8, 2017), P.R. Doc 915, (Final Determination) and accompanying Issues and Decision Memorandum (IDM), P.R. Doc 892. The period of investigation (POI) covered by this review is October 1, 2015 through September 30, 2016.

methodology, with zeroing. We remand the differential pricing methodology issue to Commerce to address its consistency with the United States Court of Appeals for the Federal Circuit's determinations in *Stupp Corp. v. United States*, 5 F. 4th 1341 (Fed. Cir. 2021), *Mid Continent Steel & Wire Inc. v. United States*, 940 F. 3d 662 (Fed. Cir. 2019), and *Mid Continent Steel & Wire Inc. v. United States*, 31 F. 4th 1367 (Fed. Cir. 2022).

Both the GOC and Resolute challenge Commerce's decision to deduct export taxes collected by the GOC under the 2006 Softwood Lumber Agreement (2006 SLA), where applicable, from the price paid on softwood lumber subject to those export taxes. We remand this issue to Commerce for further explanation.

Petitioner claims that for one of the four mandatory respondents, Tolko Marketing and Sales Ltd. and its affiliated production company, Tolko Industries, Ltd. (collectively, Tolko), Commerce erred when it calculated Tolko's General and Administrative (G&A) expenses, used for purposes of calculating Tolko's cost of production for the subject merchandise. Petitioner asserts that Commerce should not have excluded losses Tolko incurred for three plant closures and sales. In calculating Tolko's G&A expenses, Commerce used Tolko's consolidated financial statements, which provided more detail than its unconsolidated financial statements. Petitioner claimed that this was inconsistent with agency practice and not in accordance with the law. We disagree and affirm Commerce's Final Determination in this respect.

Resolute challenges Commerce's refusal to grant a start-up adjustment to the Ignace and Atikokan mills. We affirm Commerce's decision concerning the Ignace mill. We remand to Commerce for further explanation regarding the start-up adjustment for the Atikokan mill.

Resolute also challenges Commerce's determination to deny the profit generated in the Thunder Bay pellet mill as an offset to the reported Thunder Bay lumber manufacturing costs. Commerce made this determination because Resolute treats sawdust as a by-product in its normal books and records. Commerce provided a reasonable explanation for the exercise of discretion in this matter. We affirm Commerce's determination on this issue.

Resolute claims that Commerce erred in calculating its G&A expense ratio and that Commerce should not have included certain of Resolute Forest Products, Inc.'s (RFP) expenses in the calculation of Resolute's G&A expense ratio because RFP is not a producer or exporter of subject merchandise. We disagree and affirm Commerce's Final Determination in this respect.

II. STANDARD OF REVIEW

Article 1904(3) and Annex 1911 of the NAFTA require the Panel to apply the standard of review set out in § 516A(b)(1)B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(B)(1)(B). It provides that the Panel "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." The substantial evidence standard requires Commerce to base its determinations on a reasonable analysis of the record evidence instead of speculation or assumption. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] In determining whether Commerce's interpretation of the statute is permissible, the Panel applies the two-step framework established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* framework, the Panel must first carefully investigate the matter to determine whether "Congress

[2] *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F. 3d 1333, 1340 (Fed. Cir. 2011) (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003)).

has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ."[3] If congressional intent can be determined, the Panel must give effect to that intent, and no deference to a contrary interpretation of the statute by Commerce is warranted. However, if after review, the Panel is not able to ascertain the intent of Congress, the Panel moves to step two where the Panel must determine, "whether the agency's answer is based on a permissible construction of the statute."[4] If the traditional tools of construction do not resolve an ambiguity, the agency's interpretation must meet the requirement of reasonableness.[5]

III. ANALYSIS OF PANEL ON SCOPE

The question at issue is whether four types of products, *i.e.,* notched stringers, fence pickets, truss kits, and pallet kits (**"the four products"**) were properly included in the scope of the order. The GOC argued the four products should have been excluded based on their characteristics and because they were excluded from the scope in *Lumber IV* and in the 2006 SLA. The Panel affirms Commerce's Final Determination as based on substantial evidence and otherwise in accordance with law.

In its Final Determination, Commerce published the final scope as follows:

> The merchandise covered by this investigation **is softwood lumber, siding, flooring and certain other coniferous wood (softwood lumber products)**. The scope includes:
>
> > Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.
> >
> > Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring,

[3] *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc*., 467 U.S. 837, at 842 (1984).
[4] *Id.* at 843.
[5] *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2416 (2019) (quoting *City of Arlington, Tex. v. F.C.C*, 569 U.S. 290 (2013) ("Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.'").

that is continuously shaped (including, but not limited to, tongued, grooved, rebated,

Chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.

Coniferous drilled and notched lumber and angle cut lumber.

Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.

Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.

Finished products are not covered by the scope of this investigation. For the purposes of this scope, finished products contain or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to this investigation at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the type of merchandise that is considered "finished," for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

The following items are excluded from the scope of this investigation:

Softwood lumber products certified by the Atlantic Lumber Board as being first produced in the Provinces of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island from logs harvested in Newfoundland and Labrador, Nova Scotia, or Prince Edward Island.

U.S.-origin lumber shipped to Canada for processing and imported into the United States if the processing occurring in Canada is limited to one or more of the following: (1) Kiln drying; (2) planning to create smooth-to-size board; or (3) sanding.

Box-spring frame kits if they contain the following wooden pieces—two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails must be radius – cut at both ends. The kits must be individually packaged and must contain the exact number of wooden components needed to make a particular box-spring frame, with no further processing required. None of the components exceed 1" in actual thickness or 83" in length.

Radius-cut box-spring-frame components, not exceeding 1" in actual thickness or 83" in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantially cut so as to completely round one corner.

> Softwood lumber product imports are generally entered under Chapter 44 of the Harmonized Tariff Schedule of the United States (HTSUS). This chapter of the HTSUS covers "Wood and articles of wood." Softwood lumber products that are subject to this investigation are currently classifiable under the following ten-digit HTSUS subheadings in Chapter 44: …
>
> Subject merchandise as described above might be identified on entry documentation as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts. Items so identified might be entered under the following ten-digit HTSUS subheadings in Chapter 44: …
>
> Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.
>
> (Emphasis added)

A. LEGAL STANDARD

In an antidumping duty order issued under 19 U.S.C §§ 1671(a)(1), 1673(1) of the Tariff Act, Commerce shall include "a description of the subject merchandise, in such detail as the administering authority deems necessary." The Tariff Act, 19 U.S.C. § 1677(25), defines "subject merchandise" as "the class or kind of merchandise that is within the scope of an investigation [or] an order under this subtitle." Furthermore, the Tariff Act does not require Commerce to define the "class or kind of [foreign] merchandise" in any particular manner. [6] As such, "[b]ecause the Tariff Act is silent in this regard, Commerce has the authority to fill that gap and define the scope of an order consistent with the countervailing duty and antidumping duty laws."[7]

Commerce's determination must be based on a permissible construction of the statute.[8] Commerce's discretion in filling the gap must be exercised in a manner that reflects Commerce's

[6] *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 917 (Fed. Cir. 2019); *see also Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577 (Fed. Cir. 1990); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001).
[7] *Canadian Solar, Inc.*, 918 F.3d at 917; *SKF USA Inc.*, 254 F.3d at 1030.
[8] *Chevron,* 467 U.S. at 843.

judgment regarding what will best effectuate the purpose of the Tariff Act in the circumstances.[9] Furthermore, where Commerce deviates from prior practice or policy, it must do so by way of "reasoned decisionmaking".[10] That is, "the new policy is permissible under the statute, there are good reasons for it, and that the agency believes it to be better".[11]

Any application of Commerce's interpretation of the statute must also be made on the basis of substantial evidence. This standard requires Commerce to base its determinations on a reasonable analysis of the record evidence instead of speculation or assumption. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [12]

If an issue about the interpretation of the scope of the anti-dumping order arises, Commerce will be granted "substantial deference" in its interpretation because such orders are "particularly within the expertise" and "special competence" of Commerce.[13]

B. COMMERCE LAWFULLY ANALYZED THE SCOPE COMMENTS

Commerce set forth its analysis as follows:[14]

---

[9] *Mitsubishi Elec. Corp.*, 898 F.2d at 1583.
[10] *Canadian Solar, Inc.*, 918 F.3d at 918 (applying this standard to the determination of country of origin in a scope determination) ("[I]f, in determining [scope] in a given order, Commerce deviates from a previous policy or practice, it must provide an explanation for doing so. We review Commerce's explanation under the arbitrary and capricious standard, meaning that we consider whether Commerce's determination is the product of reasoned decisionmaking. Reasoned decisionmaking or a reasoned explanation does not require Commerce to show that the reasons for the new policy are better than the reasons for the prior policy. Rather, an explanation is reasoned if Commerce demonstrates that 'the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.' And, if Commerce's 'new policy rests upon factual findings that contradict those which underlay its prior policy,' the reasoned explanation must justify 'disregarding facts and circumstances that underlay or were engendered by the prior policy.'") (citations omitted).
[11] *Id.*
[12] *See Zhejiang DunAn Hetian Metal Co.*, 652 F.3d at 1340 (quoting *Nippon Steel Corp.*, 337 F.3d at 1379).
[13] *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998); *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (quoting *Sandvik Steel Co.*, 164 F.3d at 600).
[14] Preliminary Scope Memorandum, at 7.

> First, the Department must ensure that the scope accurately reflects the products for which the petitioner seeks relief. Second, the Department must provide interested parties with sufficient opportunity to present comments that can be evaluated by the Department, because once the scope of an order is published, with certain exceptions, that scope will apply for the life of the order. Finally, the Department must seek to ensure that the finalized scope is both administrable by CBP and not susceptible to circumvention and evasion.

i. THE POLICY AND PRACTICE APPLIED BY COMMERCE TO DETERMINE SCOPE IS THAT IT GENERALLY FOLLOWS THE SCOPE PROPOSED BY A PETITIONER, WHICH IS IN ACCORDANCE WITH LAW.

Commerce has stated its policy and practice is to follow the scope proposed by the petitioner absent "overarching" concerns related to circumvention, evasion or administrability.[15] This includes following exclusions the petitioner and other interested parties have agreed on. This was the case for the four products in *Lumber IV* and the SLA 2006.[16] However, no such agreement was reached in the present investigation.[17]

In the *Circular Welded Austenitic Stainless Pressure Pipe* determination, Commerce held that "absent an overarching reason to modify the scope in the petition, the Department accepts [the scope as proposed]".[18] Commerce further explained that: "absent approval by the petitioner,

[15] Preliminary Scope Memorandum, at 6-7, nn.16, 17 (referring to the *Narrow Woven Ribbons* determination of 2010, the *Lumber IV* determination of 2002 and the *Circular Welded Austenitic Stainless Pressure Pipe* determination of 2009).
[16] Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36070 (May 22, 2002) (*CVD Lumber IV*); Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36068 (May 22, 2002) (*AD Lumber IV*) (collectively *Lumber IV*); *see also* PSM, at 13.
[17] IDM, at 15 (Comment 3).
[18] *Id.*

administrability concerns, or concerns about possible future circumvention or evasion, it is not the Department's practice to modify the scope in the Petition."[19]

In this case Commerce encouraged the petitioner and other interested parties to agree on exclusions.[20] They did so for other products.[21] The GOC has countered that Commerce's practice or policy to follow the scope proposed by the petitioner is nonetheless an abandonment of its duty to set scope under the statute.[22]

The Tariff Act does not require Commerce to decide scope in any particular manner, allowing Commerce to adopt the scope it "deems necessary". Commerce thus has wide discretion to determine the scope of an investigation and order. In exercising its discretion to fill this gap, Commerce's determination must be based on a permissible construction of the statute. This must reflect Commerce's judgment of what best effectuates the purpose of the Tariff Act. Commerce's stated policy and practice is that it believes that a scope proposed by a petitioner is the scope that best effectuates such purpose.[23] Commerce nevertheless leaves the door open to changing the scope where there exists administrability, evasion or circumvention concerns in relation to the

[19] PSM, at 13 (Comment 4); *see also* IDM at 19 (Comment 4) ("As noted above, if the petitioner believes certain scope language is necessary to address potential circumvention, and we find that such language is otherwise administrable, the Department will generally defer to the petitioner's desired scope language."); Commerce Rule 57(2) Brief, at 38.
[20] PSM, at 6.
[21] PSM, at 7-8 ("The petitioner has requested that the Department incorporate an exclusion for Atlantic Lumber Board (ALB)-certified lumber from both the AD and CVD investigations."); IDM at 42-44 (Comment 16C; Comment 16D). As shown in the Final Determination, Commerce included a relevant exclusion ("The following items are excluded from the scope of this investigation: Softwood lumber products certified by the Atlantic Lumber Board as being first produced in the Provinces of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island from logs harvested in Newfoundland and Labrador, Nova Scotia, or Prince Edward Island.").
[22] GOC, Rule 57(3) Brief, at 47-48.
[23] PSM, at 6-7 (footnotes 16 and 17) (referring to the *Narrow Woven Ribbons* determination of 2010, the *Lumber IV* determination of 2002 and the *Circular Welded Austenitic Stainless Pressure Pipe* determination of 2009); PSM, at 13 (Comment 4); *see also* IDM, at 19 (Comment 4) ("As noted above, if the petitioner believes certain scope language is necessary to address potential circumvention, and we find that such language is otherwise administrable, the Department will generally defer to the petitioner's desired scope language."); Commerce Rule 57(2) Brief, at 38.

scope proposed by the petitioner.[24] This is a permissible exercise of discretion to fill the gap in the statute, considering Commerce's wide discretion to set scope. Moreover, there is no abandonment by Commerce of its obligation to apply the statute by generally allowing a petitioner to set the scope, subject to certain exceptions. The question is whether Commerce properly applied the policy or practice it states it is applying. This is addressed in the next sections.

The exercise of Commerce's discretion in setting scope is also subject to justifying any relevant change in practice or policy. There is a question whether *Lumber IV* and the 2006 SLA constitute a practice or policy of Commerce, which could be considered in conflict with another practice or policy of Commerce, i.e., to generally follow the scope suggested by a petitioner where it is administrable and such proposed scope does not create circumvention or evasion issues.[25] If so, Commerce may have to explain why it was reasonable to follow one practice or policy, and not the other, in order to engage in reasoned decisionmaking. In any event, the GOC took the position that the exclusions stemming from the prior proceedings, rather than establishing a policy or practice of Commerce, "should inform Commerce's determination" because such determinations were "on the record", "especially with respect to truss and pallet kits" and their "characteristics."[26] Had the GOC not conceded that the scope under *Lumber IV* and the 2006 SLA is not practice or policy of Commerce for scope purposes, the Panel may have had to address the matter more thoroughly. In the present proceedings, however, the position of the GOC rather goes to whether Commerce's Final Determination was based on substantial evidence, which is addressed below. Commerce has in any event explained its approach, as also discussed below.

---

[24] *Id.*
[25] PSM, at 13 (Comment 4); *see also* IDM at 19 (Comment 4) ("As noted above, if the petitioner believes certain scope language is necessary to address potential circumvention, and we find that such language is otherwise administrable, the Department will generally defer to the petitioner's desired scope language.").
[26] Hearing Transcript, Day 2 (Public), 14:3-19, 15:16-22.

ii. THE CONSIDERATION OF ARGUMENTS PUT TO COMMERCE THROUGH REASONS GIVEN FOR THE DETERMINATION.

The Panel finds that Commerce did provide reasoned decisionmaking on the relevant issues of scope. Commerce did so in four ways: 1) by extensively addressing all issues; 2) by specifically addressing the relationship with prior proceedings; 3) by addressing issues relating to the four products themselves; and 4) by addressing, in any event, issues it contests it needed to address.

First, as recognized by the GOC,[27] Commerce did address the various and extensive arguments put to it on scope, made throughout the investigation, in the context of a large number of submissions by interested parties and the petitioner.[28] However, the GOC takes the position those arguments were responded to by Commerce only as an empty formality.[29] For the reasons below the Panel disagrees with this characterization of Commerce's response.

Second, Commerce addressed the issue of the relationship of this proceeding to prior Softwood Lumber proceedings in its Preliminary Scope Memorandum (PSM).[30]

Third, Commerce provided adequate reasoning on the issue of why the four products were not excluded from the scope. In the PSM, Commerce made comments on each of the four products[31] and on what constitutes finished products (by contrast to the four products).[32]

[27] GOC, Rule 57(3) Brief, at 47.
[28] *See* Commerce Rule 57(2) Brief, at 28-36 (regarding the history of the various submissions).
[29] GOC, Rule 57(3) Brief, at 47.
[30] PSM, at 12-13 (Comment 4: Products Not Covered by Prior Softwood Lumber Proceedings).
[31] *Id*. at 21-22 (Comment 11: Fence Pickets and Fencing Materials), 22-24 (Comment 12: Truss Kits), 24-25 (Comment 13: Pallet Kits), 33-34 (Comment 21: Notched Stringers).
[32] *Id*. at 15-17 (Comment 6: Finished Products).

Commerce further provided reasoned discussion on its decision to not exclude the four products from the scope of the investigation.[33]

At the hearing, the GOC stated that, in particular with respect to truss kits and pallet kits, there were characteristics of the products Commerce may have failed to consider.[34] Commerce did however address why it believed the four products, including truss and pallet kits, should be within the scope. This raises the question of whether the GOC was arguing that some or all four products, in particular truss and pallet kits, are not within the scope of the order. While not being "finished products" (which are specifically excluded), they would nevertheless not be "softwood lumber products".

In the PSM, Commerce gave the following reasons (or interpretation of the scope of its investigation), for not excluding notched stringers, fence pickets, truss kits, and pallet kits from the scope:[35]

> For fence pickets they are "boards of lumber" "explicitly covered" by the scope of the investigations, with no "special markings or cuts that would make them distinguishable as 'finished products'" excluded by the scope.
>
> For truss kits, the scope of the investigations cover "angle cut lumber,"
>
> "lumber that has undergone limited produces, such as lumber that has been drilled and notched," "semi-finished or unassembled finished products," and lumber "classified by CBP as truss components." Thus, Commerce determined that the trus[s] kits contained "minimally-processed lumber that is explicitly covered by the scope."
>
> For pallet kits, they are "softwood dimensional lumber, with some of the lumber notched," do "not appear to have any special markings or cuts that render them unsuitable for other uses, and the scope itself actually "states that it covers softwood lumber that may be classified by CBP as pallet components" (and therefore all softwood lumber in the 'kit" would be covered by the scopes of the investigations).

[33] *Id*. at 22, 24, 25, 34; *See also* Commerce Rule 57(2) Brief, at 31-32.
[34] Hearing Transcript, Day 2 (Public), 14: 3-19, 15:16-22.
[35] PSM, at 22, 24, 25, 34; *See also* Commerce Rule 57(2) Brief, at 31-32.

> For notched stringers, "the scope explicitly covers notched lumber and does not exclude products" on the basis described by "the GOC".

The GOC countered that the four products should be excluded from the scope for the following reasons:[36]

> ***Notched stringers***: the GOC points to language in *Lumber IV* that would be contrary to Commerce's observation in the present proceedings stating that "*the scope explicitly covers coniferous drilled and notched lumber and angle cut lumber*". In *Lumber IV*, the scope stated that the "*following softwood lumber products are excluded*": "*Stringers (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from center, to properly accompany forklift blades*".
>
> ***Fence pickets***: the GOC states that Commerce, in stating that fence pickets remain boards of lumber with no special markings or cuts that would make them distinguishable as excluded finished products or render them unsuitable for other uses, fails to take into consideration the proposed exclusion wording that fence pickets must "*have finials or decorative cuttings that clearly identify them as fence pickets*", which language would undercut Commerce's reasoning.
>
> ***Truss kits***: the GOC asserts that Commerce says no more than merely asserting that truss kits (and pallet kits) "*do not appear to have any special markings or cuts that render them unsuitable for other uses*".

[36] GOC, Rule 57(3) Brief, at 47-51.

Pallet kits: the GOC asserts that Commerce says no more than merely asserting that pallet kits (and truss kits) "*do not appear to have any special markings or cuts that render them unsuitable for other uses*".

At the hearing, the GOC's position was that Commerce "*should*"[37] have excluded the products rather than arguing that they were strictly outside the scope. As such, there does not appear to arise a question of interpretation of the scope. Nevertheless, in responding to arguments of interested persons, Commerce needs to engage in reasoned decisionmaking, which may require it to address why certain products are or are not within the scope of the order, which it has done.

Fourth, Commerce took the position that it did not need to address certain comments of the GOC on how the petitioner addressed scope.[38] The parties' arguments were like ships passing in the night on this issue. This was perhaps because the GOC's position appears to turn on its head Commerce's policy and practice, and how it should be reviewed. From Commerce's perspective, it has a policy or practice of following petitioner's proposed scope. If such scope presents administrability, evasion or circumvention concerns, then Commerce may amend the scope definition. The GOC rather starts from the exception rather than the general position (which general position it states is inadmissible delegation of authority – an argument rejected above), arguing the exclusions should have been granted because there is no administrability, evasion or circumvention concern. The Panel need not decide whether Commerce is correct as to which

[37] Hearing Transcript, Day 2 (Public), 14:3-19, 15:16-22.
[38] PSM, at 13 (Comment 4) ("It is the petitioner that is the party alleged to be harmed by the dumping or subsidization of merchandise, and therefore, the GOC's assertion that the petitioner's concerns regarding circumvention are unfounded does not factor into our determination of whether a covered product should be included or excluded from the scope of an investigation or a resulting order.").

comments of the GOC it needed to address, since Commerce in any event provided reasoned decisionmaking on the relevant issues.[39]

The Panel addresses the remaining issues on scope in the next subsection.

iii. WHETHER THE POLICY OF DEFERRING TO THE SCOPE PROPOSED BY THE PETITIONER SHOULD BE FOLLOWED, FOR EXAMPLE BECAUSE OF ADMINISTRABILITY, CIRCUMVENTION, EVASION OR OTHER RELEVANT CONSIDERATIONS.

The Panel upholds Commerce's Final Determination not to modify the proposed scope for two reasons: 1) there is no allegation of any issue of administrability, circumvention or evasion risks actually arising; and 2) Commerce has provided reasons on all other relevant issues, in particular on the characteristics of the products and potential evasion risks should the proposed scope not be adopted, to the extent Commerce had to respond to these concerns.

First, there is no allegation in the record that the scope proposed by the petitioner is subject to administrability, circumvention, or evasion risks. Rather, the GOC's position is that the scope proposed is, to the contrary, too restrictive in terms of preventing circumvention or evasion, in that excluding the four products at issue from the scope of the order would create no such risk. Because no allegation of circumvention, evasion or administrability was raised, this should end the Panel's inquiry according to Commerce. Second, Commerce has nonetheless provided additional reasons as to why it did not adopt the requested exclusion,[40] whether it had to or not, addressing the various arguments of the GOC. For example, the GOC argued that the Petitioner's submissions on

[39] IDM, at 19 (Comment 4) ("Accordingly, we take no heed of the GOC's assertion that the petitioner's concerns regarding circumvention are 'unfounded,' or that there exist methods for limiting circumvention concerns.… Furthermore, even if the petitioner was required to state its reasons for refusing to exclude certain merchandise from these investigations, which it is not, it has satisfied that requirement in this case [then going over the reasons for another page or so]."); *See also* IDM, at 13-17 (Comment 3), 17-20 (Comment 4).
[40] IDM, at 17-20 (Comment 4); *see also* Commerce Rule 57(2) Brief, at 33.

administrability, circumvention, and evasion risks should be disregarded because the Petitioner does not produce the relevant products and thus has no interest in requesting such a scope.[41]

Commerce's reasons for rejecting this argument are first that the petitioner and interested parties did not agree to such exclusion.

Second, Commerce's explanation is that the contested products are "softwood lumber" or "softwood lumber products" and not "finished products", the latter being excluded from the scope of the investigation and order.

Third, Commerce provides extensive explanations in response to the GOC's arguments, that these four products are softwood lumber products, and not finished products. Commerce thus concluded that Petitioner's contention "there is little difference between these products and general lumber was reasonable."[42]

Fourth, Commerce weighs evidence cited by Petitioner that there is a risk of evasion or circumvention, if the proposed scope is not adopted. According to Commerce, Petitioner "cited, throughout this record, to instances of circumvention or administrability challenges posed by the products under discussion. For instance, the Petitioner has cited to difficulties experienced by CBP in distinguishing truss components from general lumber (and) fence posts from general lumber …."[43]

[41] GOC, Rule 57(3) Brief, at 47-48.
[42] IDM, at 19 (Comment 4).
[43] IDM, at 19 (Comment 4).

For example, in the Final Issues and Determination Memorandum (IDM), Commerce discussed two letters from Petitioner[44] that identified difficulties in distinguishing truss components from general lumber.[45] Commerce determined that this evidence demonstrated circumvention and evasion risks or administrability concerns, with respect to the four products. Commerce also observes that those products are not obviously unsuitable for other uses. Commerce's conclusion to that effect is reasonable.

As such, Commerce's determination on scope was based on substantial evidence, as well as reasoned decisionmaking, and thus is upheld by this Panel.

IV. DIFFERENTIAL PRICING

A. BACKGROUND

i. DUMPING AND DUTY ASSESSMENT

To impose an antidumping duty, Commerce determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."[46] The duty is the "amount by which the normal value exceeds the export price … for the merchandise."[47] The price at which the foreign producer or exporter sells the merchandise in the United States is the export price.[48] Normal value is the price at which the merchandise is sold for consumption in the exporting country "at a time reasonably corresponding to the time of sale used to determine the export price."[49]

---

[44] Letter, "Supplement to the Petitions for the Imposition of Antidumping Duties on Imports of Certain Softwood Lumber Products from Canada: Response to the Department's Supplemental Questions" (Dec. 1, 2016), at 1-2; Letter from Petitioner, "Response to Comments on Scope" (Jan. 19, 2017), at 10, 18-19; both cited in IDM at 19 (Comment 4) (footnotes 64-68).
[45] IDM, at 19 (Comment 4) (footnotes 66-68).
[46] 19 U.S.C. § 1673(1).
[47] 19 U.S.C. § 1673(1).
[48] 19 U.S.C. § 1677a(a).
[49] 19 U.S.C. § 1677b(a)(1)(A).

To determine whether dumping has taken place, Commerce compares the weighted average of normal values to the weighted average of export prices for sales of comparable merchandise during the period of investigation (POI).[50] This is the A - A method of calculation. Commerce can choose to apply instead the T - T method by comparing the prices of individual transactions, for both normal values and export prices.[51]

As an exception, Commerce applies the A - T differential pricing method comparing weighted average normal values and individual transaction prices if two requirements are met. One requirement is that there must be "a pattern of export prices … for comparable merchandise that differ significantly among purchasers, regions or periods of time."[52] In addition, Commerce must explain "why such differences cannot be taken into account"[53] using the A - A method or the T - T method. In A - T comparisons, Commerce uses zeroing to reveal masked dumping. When zeroing is applied, margins are set to zero whenever the export price is above the normal value, so that higher prices do not offset lower ones. Commerce does not use zeroing for A - A comparisons or for T - T comparisons.

In order to determine whether there are export prices that differ significantly among purchasers, regions or periods of time, Commerce compares a test group of the exporter's prices to its other export prices for merchandise with the same product control number (CONNUM) during the POI. The prices for sales to a purchaser are compared to the exporter's prices to all other purchasers. The prices for sales to a region are compared to the exporter's prices for all other regions. The prices for sales in a time period are compared to the exporter's prices for all other time periods. In order to run a comparison, each test group and comparison group must have at

[50] 19 U.S.C. § 1677f-1(d)(1)(A)(i).
[51] 19 U.S.C. § 1677f-1(d)(1)(A)(ii).
[52] 19 U.S.C. § 1677f-1(d)(1)(B)(i).
[53] 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

least two data points and the comparison group must represent at least 5% of the total sales quantity of comparable merchandise.[54]

To determine whether prices differ significantly between the test group and the comparison group, Commerce relies on the Cohen's *d* formula that is used in statistics to compare groups of data points. Commerce determines the weighted average export price (i.e. mean) for each test group and comparison group.[55] The difference between the two means is the numerator of the Cohen's *d* formula. The denominator is the "pooled standard deviation" which is the square root of the simple average of the variances for the two groups.[56] This pooled calculation is "a figure, reflecting the general dispersion of the pricing data, that serves as a benchmark against which to judge the significance of the difference stated in the numerator."[57] If the Cohen's *d* formula produces a result equal to or greater than 0.8, the difference between the two groups is considered significant and the prices in the test group (to a purchaser, to a region, or in a time period) are considered to have "passed" Cohen's *d*.

To determine whether there is "a pattern of export prices … that differ significantly,"[58] Commerce then aggregates the exporter's prices that passed Cohen's *d*, while adjusting so that no export price is counted more than once. If 66% or more of the value of the exporter's sales passed, Commerce will consider applying the A - T method for all sales in the POI. If more than 33% but less than 66% by value passed, Commerce will consider applying the A - T method for sales that passed, and the A - A method for other sales. If 33% or less of the exporter's sales by value passed, Commerce concludes that there is no pattern and applies the A - A method to all sales in the POI.

---

[54] Commerce's Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada, June 23, 2017, at 14.
[55] *Id.*
[56] Commerce, Rule 57(2) Brief, at 53.
[57] *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1369 (Fed. Cir. 2022) (*Mid Continent II*).
[58] 19 U.S.C. § 1677f-1(d)(1)(B)(i).

Before the A - T method is applied, Commerce addresses the explanation of "why such differences cannot be taken into account"[59] under the A - A method or the T - T method. Commerce runs the A - T calculations and compares them to the calculations done on the A - A method. If the difference between these two results is at least 25% or if the A - T calculations would move the exporter's dumping margin above the de minimis level, Commerce concludes that the A - T method makes a meaningful difference. In those instances, Commerce will apply the A - T method to some or all of the exporter's transactions, in accordance with the ratio previously determined.

ii. **OVERVIEW OF ARGUMENTS**

This NAFTA review was initiated in 2017 and fully briefed in 2018. The Panel was not formed until 2022. During that time period, intervening case law was alleged to have affected aspects of Commerce's differential pricing methodology. The summaries below first outline the briefing in 2018, and then address arguments presented since that time.

In its briefing in 2018, the GOC argued that Commerce's finding of a pattern of prices that differ significantly among purchasers, regions or periods of time was inconsistent with statutory language because the transactions that passed the Cohen's *d* test did not show a discernible pattern among the prices. They could be too high to a particular purchaser, too low to a particular purchaser, too high to a particular region, too low to a particular region, too high in a particular time period or too low in a particular time period. When asked by Resolute to run all sales through the Cohen's *d* test again, with those that had passed in one group and those that had not passed in the other, Commerce refused, replying that the only relationship among sales in each of those two

[59] 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

groups was that they had either passed or not passed when examined individually.[60] Resolute argued that Commerce's differential pricing methodology produces random results rather than a pattern, in contravention of U.S. statutory law which implements its WTO obligations. Resolute also argued that Commerce has turned its differential pricing analysis into the general rule, rather than the exception. According to Resolute's research, Commerce found that at least one company had 33% or more of its sales pass the Cohen's *d* test in 145 of the 165 antidumping investigations and reviews undertaken during the POI, amounting to 87% of the determinations.[61] When asked about these numbers during the Panel hearing, Commerce did not contest their accuracy.[62]

In its 2018 briefing, Commerce argued that its differential pricing analysis is supported by substantial evidence and is otherwise in accordance with law. As the statute does not direct Commerce how to conduct differential pricing analysis, Commerce has discretion to fill the gap. Both high prices and the operation of averaging can mask dumping. The purpose of the Cohen's *d* test is to reveal prices that differ significantly within the statutory categories, Commerce contended. The ratio test then determines whether an exporter's prices show a pattern of prices that differ significantly, "such that conditions exist which may result in masked dumping."[63] Petitioner, the COALITION, noted the historical concern that A - A comparisons could mask hidden dumping, which is addressed by the exception for the differential pricing methodology.[64]

---

[60] GOC, Rule 57(1) Brief, at 36, referring to Commerce's Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances of Certain Softwood Lumber Products from Canada, November 1, 2017, at 58 (Final IDM). Canada also argued that the method of identifying prices did not respond to the Congressional intent of finding hidden dumping because Commerce made no distinction between high and low prices (GOC, Rule 57(1) Brief, at 38). Further, Canada argued that failure to include the test sales in the comparison group produced random results because the comparison group was not kept constant (GOC, Rule 57(1) Brief, at 41-45). This last argument was relinquished by Canada during the hearing before the Panel (Hearing Transcript, June 7, 2023, at 91).
[61] Resolute, Rule 57(3) Brief, Appendix B.
[62] Hearing Transcript, June 6, 2023, at 257-58.
[63] Commerce, Rule 57(2) Brief, at 74.
[64] COALITION, Rule 57(2) Brief, at 12-14.

After the Panel was formed, participants had the opportunity to file briefs on subsequent authorities.[65] As well, some reference to recent cases was included in letters placed on file in April and May 2023 regarding a request by the GOC and Resolute for a conference call to consider appointing a statistics expert to assist the Panel. On May 19, 2023, in a letter from Panel Chairman Daniel B. Pickard, the Panel declined to appoint such an expert.

In their joint submissions, the GOC and Resolute argued that two decisions of the U.S. Court of Appeals for the Federal Circuit since 2018 have changed the law concerning differential pricing. Both decisions dealt with the appropriateness of Commerce's use of the Cohen's *d* test according to the study of statistics. The *Stupp* decision in 2021[66] considered the fundamental assumptions required for use of the test. The *Mid Continent I* decision in 2019[67] examined the use of a simple average, rather than a weighted average, in the denominator of the test. Both decisions found aspects of Commerce's methodology unreasonable and remanded for better explanations from Commerce.

In its submissions on supplemental authorities, Commerce contended that the GOC and Resolute are precluded from using arguments based on academic literature concerning statistics such as in *Stupp* and *Mid Continent I & II*, as that was factual material that was not presented during this investigation and Commerce had not been given an opportunity to consider it then. Commerce stated that the findings in those two cases were based on the facts and arguments presented in those files, which are not on record in this investigation. Commerce maintained that the doctrines of exhaustion and waiver applied. Federal Circuit decisions in *Stupp* and *Mid*

[65] Panel Order of January 9, 2023, granting in part the Canadian Parties' Partial Consent Motion for Leave to File Supplemental Briefing to Address Subsequent Authorities.
[66] *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021) (*Stupp*).
[67] *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 667 (Fed. Cir. 2019) (*Mid Continent I*); See also *Mid Continent II.*

Continent I & II are relevant authority, but Commerce argued that they have not reached final conclusions and questions raised in those decisions involve distinct records and substantive arguments not raised in this investigation.

B. ANALYSIS

i. THE USE OF DECISIONS FROM THE WORLD TRADE ORGANIZATION

Resolute has not asked the Panel for an order on the permissibility of zeroing,[68] although the issue was argued before us. The matter was raised as background and part of the argument over possible use of decisions from the World Trade Organization (WTO) in the Panel's analysis. Here we set out our approach concerning adverse WTO rulings.

Resolute argued that Commerce's differential pricing methodology is in breach of U.S. obligations under the WTO Anti-Dumping Agreement (ADA).[69] The WTO Appellate Body has found inconsistency between Commerce's differential pricing mechanism and the ADA.[70] In several decisions, the Appellate Body has found zeroing contrary to WTO obligations.[71] Resolute argued that U.S. law on zeroing should be construed to be consistent with international obligations,

---

[68] Hearing Transcript, June 6, 2023, at 43.

[69] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, in *Marrakesh Agreement Establishing the World Trade Organization, Annex 1A*, *Multilateral Agreements on Trade in Goods,* April 15, 1994, 1867 U.N.T.S. 187 (entered into force January 1, 1995).

[70] Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R (adopted September 26, 2016).

[85] Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R (adopted September 26, 2016); Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (adopted February 19, 2009); Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (adopted May 20, 2008); Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted January 23, 2007); Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (adopted May 9, 2006); Appellate Body Report, *Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/AB/R (adopted August 31, 2004) (mutually agreed solution notified October 12, 2006) (*Softwood Lumber from Canada DS264*). In its Supplemental Authorities reply, the COALITION noted that a recent WTO Panel accepted zeroing in the A-T methodology, for certain transactions (WTO Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R, circulated to Members April 9, 2019, appeal by Canada June 4, 2019 (unadopted)). On other reasoning, that Panel found Commerce's differential pricing methodology inconsistent with U.S. obligations in the ADA.

as statutory provisions do not prevent such an interpretation. In support of this argument, Resolute relied on *Murray v. Schooner Charming Betsy*, ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").[72] Both Resolute and the GOC argued that WTO sources can be used as persuasive authority for the interpretation of U.S. law, since the Uruguay Round Agreements Act[73] was intended to implement WTO agreements.

Commerce argued that Sections 123 and 129 of the Uruguay Round Agreements Act preclude the operation of the *Charming Betsy* doctrine for adverse WTO rulings. Commerce contends that Congress has authorized the Office of the United States Trade Representative (USTR) to consider whether to implement such rulings, through a consultation process that is the exclusive method of implementation. The COALITION argued that decisions of the WTO Appellate Body are without effect in U.S. law unless implemented pursuant to the USTR process.

The Panel notes that the NAFTA Panel in *Lumber IV* on its second remand[74] did use WTO law in accordance with the *Charming Betsy* doctrine to rule against zeroing in U.S. law. This was a reversal of that Panel's position in its original decision and first remand which had found Commerce justified in the use of zeroing. The change occurred after the Section 123/Section 129 process led to the decision by the United States to implement the WTO ruling against zeroing in *Softwood Lumber from Canada DS264*. WTO decisions normally request a Member to bring its laws into conformity with WTO provisions, and are not retroactive. The legislation implementing the decision in U.S. law applied only from April 27, 2005. The complainants asked the *Lumber IV* Panel to reconsider its original decision and make an order retroactive to the beginning of the

[72] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). The *Charming Betsy* doctrine is endorsed in *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1345, 1348 (Fed. Cir. 2004).
[73] 108 Stat. 4809.
[74] NAFTA Panel Report, *Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, USA-CDA-2002-1904-02, *Decision of the Panel Following Remand*, June 9, 2005.

review in 2002. The *Lumber IV* Panel remanded to Commerce with an order to recalculate margins retroactively for those sales without zeroing.

The *Lumber IV* Panel said:

> The analysis presented here might well have differed had USTR determined, after appropriate consultation, to *not* direct implementation of the DSB's ruling (by paying compensation or accepting the imposition of sanctions). In this scenario, which differs from the circumstances before us, it may well be that the Section 123/Section 129 process would then continue to preclude resort to judicial review of the determination.[75]

Article 1904(2) of the North American Free Trade Agreement (NAFTA), provides that a Panel established under that Article applies the antidumping law of the importing Party, consisting of "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." While we may consider the *Lumber IV* Panel decision, as well as other NAFTA and WTO decisions, as persuasive authority, their reasoning is not binding on us. The facts before us are not the same as those before the *Lumber IV* Panel, as USTR is not recommending any change in U.S. law relevant to the matters before us.

The decisions of the U.S. Court of Appeals for the Federal Circuit are binding on this Panel. The decisions of that Court are definitive in giving the USTR consultation process in the Uruguay Round Agreements Act control over the relationship between adverse WTO rulings and U.S. domestic law. In decisions of the Federal Circuit, there is ongoing support for Commerce's ability

[75] *Id*. 37 (emphasis in original). There is statutory control on Commerce or another agency unilaterally modifying a "regulation or practice" in light of an adverse WTO ruling. Section 123(g) of the Uruguay Round Agreements Act prohibits such action unless or until taken through the USTR process. The *Lumber IV* Panel discussed this provision, noting that zeroing was not contained in a regulation (*Id*. 37-38). The Statement of Administrative Action considered that "practice" in Section 123(g) referred to an "administrative practice consisting of written policy guidance of general application" (SAA at 352). After being informed that there was no written policy on zeroing, the *Lumber IV* Panel concluded that the statutory control did not govern zeroing.

to use zeroing,[76] despite contrary WTO rulings.[77] Aggregation of sales that passed the Cohen's *d* test is also supported, in the face of a contrary WTO ruling.[78]

The Panel does not rely on the *Charming Betsy* doctrine or adverse WTO decisions in our analysis.

ii. THE DOCTRINES OF EXHAUSTION AND WAIVER

Article 1904(3) of the NAFTA requires all panels to apply the "general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority."[79] "General legal principles" are defined in Article 1911 to include "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies."[80] The statutory language, 28 U.S.C. § 2637(d), requires, where appropriate, the exhaustion of administrative remedies.[81] Exhaustion allows agencies to apply their expertise, rectify administrative mistakes, and compile records adequate for judicial review – advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency.[82]

There are certain exceptions to the exhaustion doctrine: "where exhaustion would be a useless formality, intervening legal authority might have materially affected the agency's actions, the issue involves a pure question of law not requiring further factual development, where clearly

---

[76] *Mid Continent I*; *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322 (Fed. Cir. 2017).
[77] *United States Steel Corp. v United States*, 621 F.3d 1351 (Fed. Cir. 2010); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 395 F.3d 1343 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004).
[78] *Dillinger France S.A. v. United States*, 981 F.3d 1318 (Fed. Cir. 2020).
[79] NAFTA, Art. 1904(3).
[80] *Id.* at Art. 1911.
[81] *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 (1946) "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter."
[82] *United States v. L.A. Tucker Truck Lines, Inc.* , 344 U.S. 33, 37 (1952) "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts." *See also: Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375 (Fed. Cir. 2008).

applicable precedent should have bound the agency, or where the party had no opportunity to raise the issue before the agency."[83]

Concerning exhaustion, the GOC and Resolute maintained that they are not precluded from presenting arguments on the appropriateness of Commerce's use of the Cohen's *d* test, as there are exceptions to exhaustion. They argued that *Stupp* and *Mid Continent I & II* are available through the exception for pure questions of law or through the exception for intervening judicial interpretations of existing law which if applied might have materially altered the result.[84] As well, it was contended that arguments were not waived, since they were presented in opening supplemental authorities briefing, the first opportunity permitted by the Panel's Order of January 9, 2023.

We agree with Commerce that general statements contesting differential pricing were not sufficient to raise these issues in the administrative process.[85] However, the exception for intervening judicial authority applies here, as the decisions in *Stupp* and *Mid Continent I & II* might have a material effect on Commerce's analysis. The rule that arguments are waived if not raised in an opening brief[86] promotes efficiency and fairness in judicial proceedings. Since the GOC and Resolute presented detailed arguments on *Stupp* and *Mid Continent I & II* in their joint Supplemental Brief on Subsequent Authorities in the first round of briefing permitted by the Panel's Order of January 9, 2023, these arguments were not waived.

We find that the GOC and Resolute may present arguments flowing from the effects of *Stupp* and *Mid Continent I & II* on Commerce's differential pricing methodology, as those

[83] *Meridian Products, LLC, v. United States*, 77 F. Supp. 3d, 1307, 1312 (Ct. Int'l Trade 2015) (citations omitted).
[84] *Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941).
[85] *Stanley Works (Langfang) Systems Co. Ltd. V. United States*, 279 F. Supp. 3d 1172, 1189 (Ct. Int'l Trade 2017) "Broad, generalized challenges to the differential pricing analysis do not incorporate any conceivable challenge to elements of that analysis."
[86] *Corus Staal v. United States*, 502 F.3d 1370, 1379 n.4 (Fed. Cir. 2007).

decisions are intervening judicial authority which might have altered the result and the arguments are not precluded by the doctrines of exhaustion or waiver.

iii. COMMERCE METHODOLOGY AND REVIEW BY THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The *Stupp* decision of the Federal Circuit in 2021[87] involved a challenge that Commerce's use of the Cohen's *d* formula for test groups and comparison groups failed to meet fundamental statistical assumptions of sufficient size, normal distribution and roughly equal variances. It was argued that, if those assumptions are not met, the reliability and usefulness of the results are affected. The Court agreed and determined that the concerns raised questions about the reasonableness of the use of the Cohen's *d* test. The Court found that applying the test to groups having very few data points was particularly problematic.[88] Small groups lacking normal distribution or with a small variance could lead to upward bias and a greater number of results that pass the Cohen's *d* test.[89] The Federal Circuit partially vacated the Court of International Trade (CIT) decision below and remanded to Commerce for an explanation of whether the fundamental assumptions were met or whether they did not have to be met in less-than-fair-value determinations. The Court invited Commerce to clarify its argument that having data on the full universe of sales makes it permissible to disregard the assumptions.[90]

Commerce noted that the Federal Circuit in *Stupp* affirmed the ratio test that implements the pattern, the meaningful difference test and, in the abstract, the overall reasonableness of Commerce's differential pricing methodology.[91] The Court in *Stupp* stated that the rationale

[87] *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021) (*Stupp*).
[88] *Id*. at 1358.
[89] *Id*. at 1359.
[90] *Id*. at 1360.
[91] *Id.* at 1354-56. In its Rule 57(3) brief, Resolute argued that Commerce had not adopted the differential pricing methodology pursuant to a notice and comment procedure. The Court of Appeals in *Stupp* confirmed that the differential pricing analysis is an interpretive rule, subject to the reasonableness standard. As it is not a legislative rule, it is not subject to a requirement to follow the notice and comment procedure. (*Stupp,* at 1351-52)

behind the methodology is that if prices differ significantly, then targeted dumping is more likely.[92] Commerce argued that the remand in *Stupp* and a similar remand in *NEXTEEL*[93] were on the narrow issue of requiring Commerce to explain its position on the Cohen's *d* test and the fundamental assumptions. The CIT affirmed Commerce on the remand in *Stupp* in February 2023, on the basis that the ratio test and meaningful difference test reasonably controlled for any false positives that might result from failure to adhere strictly to the three assumptions.[94] The CIT acknowledged the risk of upward bias associated with small groups,[95] but was informed that actual application of the differential pricing analysis resulted in use of the alternative comparison methodology for a "relatively small number of respondents."[96] Also in February 2023, the CIT in *SeAH* refused a motion to reconsider a judgment approving Commerce's application of differential pricing methodology, on the ground that the use of the whole population meant that sample size, sample distribution and the statistical significance of the sample were not relevant.[97] These issues are currently before the courts in ongoing litigation, and not yet resolved. Commerce argues that *Stupp* did not find that use of Cohen's *d* was unlawful. In addition, Commerce stated that the Federal Circuit had previously upheld its methodology as reasonable in *Apex.*[98]

The GOC argues that the decisions of the CIT in remand in *Stupp* and in other cases approving of Commerce's methodology are faulty. In the GOC's view, the assumptions must be met for the Cohen's *d* formula to produce meaningful results.[99] Further, the GOC maintains that since groups with only two members can be subject to the methodology, Commerce's approach

[92] *Id*. at 1345.
[93] *NEXTEEL Co. Ltd. v. United States*, 28 F.4th 1226 (Fed. Cir. 2022)
[94] *Stupp Corporation v. United States*, Slip. Op. 23-23, 2023 WL 2206548 (Ct. Int'l Trade 2023)
[95] *Id*. at 7.
[96] *Id.* at 9.
[97] *SeAH Steel Corp. v. United States*, 619 F. Supp. 3d 1309 (Ct. Int'l Trade 2023). On the same reasoning, *see Marmen Inc*. *v. United States*, 627 F. Supp. 3d 1312 (Ct. Int'l Trade 2023).
[98] *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F 3d 1322 (Fed. Cir. 2017) (*Apex*).
[99] *NEXTEEL Co. Ltd. v. United States*, 633 F. Supp. 3d 1190 (Ct. Int'l Trade 2023).

cannot be supported as reasonable. The GOC argued that the *Apex* decision can be distinguished as it dealt with the meaningful difference test, which the GOC and Resolute are not contesting. The GOC and Resolute challenge only the Cohen's *d* analysis and the ratio test.

Stupp is a decision of the Federal Circuit. The Panel is bound by that Court's decisions, not by those of the CIT. We therefore follow *Stupp* and remand to Commerce for an explanation of whether the limits on the use of the Cohen's *d* test were met in this case or whether those limits need not be followed by Commerce. In this regard, Commerce is invited to clarify its argument concerning availability of the full universe of sales data. We acknowledge the ongoing litigation of these issues.

In *Mid Continent* in 2019,[100] the Federal Circuit held that it was unreasonable for Commerce to use a simple average for the pooled standard deviation in the Cohen's *d* denominator, rather than a weighted average. The numerator in the Cohen's *d* formula is the difference between the weighted average (i.e. mean) prices of the test group and the comparison group. The denominator represents the general dispersion of prices in the data pool, to show whether the difference in the numerator is significant. The denominator is the pooled standard deviation, calculated as the square root of the simple average of the variances for the two groups.[101] The Court of Appeals partially remanded, holding that Commerce had not adequately explained why it used simple averaging, since the statistical literature calls for weighted averaging when groups are of different sizes.[102]

If a test group is smaller than a comparison group and has a smaller variance, simple averaging produces a lower denominator than would be the case if weighted averaging were used.

[100] *Mid Continent I.*
[101] The variance is the square of the standard deviation. See: *Mid Continent I*, at 671; *Mid Continent II*, at 1369-70.
[102] *Mid Continent I*, at 674-75.

In that context, simple averaging increases the result produced by the formula and makes it more likely that sales will pass the Cohen's *d* test.[103] The Court acknowledged Commerce's argument that a small group cannot be assumed to have a lower variance, but held that this did not explain why weighted averaging would be distortive or why simple averaging was preferable.[104]

When *Mid Continent* returned to the Federal Circuit in 2022,[105] the Court again remanded for further explanation. The Court noted that the statistical literature uses weighted averaging for the pooled figure in the denominator whenever there are differences in the sizes or standard deviations (or variances). Simple averaging is used only if the groups being compared are of equal size.[106] Since Commerce has full information on the prices, the Court noted that Commerce could show the general dispersion of prices in the denominator by using the standard deviation for the two groups measured together – "seemingly the preferred way if the full set of population data is available."[107] If Commerce uses a pooled calculation, the sources in the statistical literature point to weighted averaging. In April 2023, the CIT[108] remanded *Mid Continent* back to Commerce, finding that Commerce's claim of academic support for the simple average "appears to be contradicted by the literature itself."[109]

Commerce argues that *Mid Continent I & II* merely remanded for further explanation and did not find use of the Cohen's *d* formula unlawful. Commerce also points out that these issues are currently before the courts and matters are not yet resolved.

Mid Continent I & II are decisions of the Court of Appeals of the Federal Circuit. The Panel is bound by the Court's decisions. We therefore follow *Mid Continent I & II* and remand to

[103] See *Stupp Corp. v. United States*, 5 F.4th 1341, 1359 (Fed. Cir. 2021).
[104] *Mid Continent I,* at 674.
[105] *Mid Continent II.*
[106] *Id*. at 1374.
[107] *Id*. at 1377. See *id.* at 1378, 1380.
[108] *Mid Continent Steel & Wire, Inc. v. United States*, 628 F. Supp. 3d 1316 (Ct. Int'l Trade 2023).
[109] *Id*. at 20.

Commerce for an explanation of its choice for the Cohen's *d* denominator, either simple averaging or an alternate choice. We acknowledge the ongoing litigation of these issues.

iv. ARGUMENT CONCERNING SEASONALITY

The issue of seasonality was raised and argued during the hearing in connection with Commerce's differential pricing analysis. We conclude that this issue was not presented in the briefs and therefore has been waived.

In 2018, Resolute argued that the pass rate for many of its sales in the differential pricing analysis was due to price increases over the POI from October 1, 2015 to September 30, 2016, during which time the market price for softwood lumber increased by nearly 20 percent.[110] Resolute stated that its transactions that passed the Cohen's *d* test were mostly identified through calculations for time periods, when Commerce compares each quarter to the other three quarters in the year.[111]

Commerce and the parties commonly refer to the subject merchandise as "dimension lumber,"[112] "dimensional lumber"[113] or "dimension framing lumber"[114] due to its use in the construction of houses. Since harsh winter conditions in some areas of the United States limit home construction activity for parts of the year, it can be expected that demand will be lower at those times and higher in the rest of the year. Resolute questions the reasonableness of inferring masked dumping from comparisons of time periods without taking into account the effect of seasonality on prices.

[110] Resolute Rule 57(3) Brief, at 23.
[111] Hearing Transcript, June 6, 2023, at 16–18.
[112] Final IDM, 16; GOC, Rule 57(1) Brief, at 72, 75.
[113] Final IDM, at 19, 32, 37; Petitioner, January 19, 2017, Response to Comments on Scope, P.R.140, 9.
[114] GOC, Rule 57(1) Brief, at 77.

Resolute contends that the doctrine of exhaustion does not preclude this argument because another party presented a claim of seasonality concerning differential pricing in the administrative case, which Commerce analyzed and rejected.[115] Commerce argues that, although the argument was raised in the earlier stage, Resolute did not specifically raise it in the briefing in 2018 and waiver therefore applies.[116] Resolute notes that it mentioned the rise in prices over the course of the POI in its Rule 57(3) brief,[117] but this is not an explicit reference to seasonality. It is sound practice to treat as waived any arguments not raised in a party's opening brief.[118] Without briefing, Commerce has not had a full opportunity to present its views to the Panel. We conclude that Commerce is correct that the issue was waived in this review.

V. COMMERCE MUST RECONSIDER THE DEDUCTION OF EXPORT TAXES UNDER THE 2006 SLA.

The GOC and Resolute contest Commerce's deduction of export taxes paid by Resolute and other mandatory respondents on exports of softwood lumber to the United States during a portion of the POI under the terms of the 2006 SLA. In the Final Determination, Commerce deducted these export taxes from gross prices in its calculation of export price (EP) and constructed export price (CEP). The GOC and Resolute assert that the 2006 SLA export taxes were intended to offset countervailable subsidies and therefore Commerce was prohibited by statute from deducting the charges.

There is no dispute that the export taxes were paid in accordance with the 2006 SLA, and, by its terms, it is clear that the 2006 SLA was intended to resolve all pending antidumping and countervailing duty allegations at the time it was executed. The United States and Canada entered

[115] Final IDM, at 51, 60-61 (claim by West Fraser).
[116] Hearing Transcript, June 6, 2023, at 243–44. Hearing Transcript, June 7, 2023, at 110-12.
[117] Hearing Transcript, June 7, 2023, at 55-56.
[118] *Fuji Photo Film Co. Ltd. v Jazz Photo Corp.*, 394 F.3d 1368, 1375 n.4 (Fed. Cir. 2005).

into the SLA in 2006 to resolve various ongoing disputes relating to U.S. domestic industry claims of unfair trade in Canadian softwood lumber. Pursuant to the 2006 SLA, both governments, as well as all represented parties and participants, agreed to terminate the legal actions related to softwood lumber; the United States agreed to revoke its countervailing and antidumping duty orders on softwood lumber from Canada, effective retroactive to May 22, 2002; and Canada agreed that for a period of seven years after the 2006 SLA's effective date, it would impose export taxes on certain softwood lumber exported to the United States. The 2006 SLA was originally set to expire on October 12, 2013, but the parties agreed in 2012 to extend the Agreement by two years, as permitted under its terms.

The Panel must consider (1) whether the Canadian Parties' arguments regarding the purpose and intent of the export taxes were properly raised before Commerce sufficiently to avoid the administrative law doctrine of exhaustion; and (2) if so, whether Commerce was legally permitted to deduct export taxes imposed under the 2006 SLA in its EP and CEP calculations.

A. THE CANADIAN PARTIES PROPERLY RAISED CLAIMS REGARDING THE TREATMENT OF SLA EXPORT TAXES IN THE PROCEEDING BELOW; THE DOCTRINE OF EXHAUSTION DOES NOT APPLY.

The exhaustion argument raised by Commerce is a narrow one: namely, whether this Panel is permitted to take notice of the Federal Circuit decision in *Almond Bros. Lumber v. United States*, 651 F.3d 1343 (Fed. Cir. 2011), in which the Court referenced the scope and intent of the 2006 SLA while considering issues wholly unrelated to the statutory provision at issue here. Neither the record below before Commerce nor the doctrine of exhaustion precludes this Panel from reviewing the challenge to the treatment of export taxes paid under the 2006 SLA. To the extent

Commerce asserts that Resolute waived its right to appeal the export tax deduction because it did not cite a specific case, it is incorrect as a matter of law.[119]

Rather, the threshold inquiry is whether the issue was raised in the proceeding below, and the GOC and mandatory respondents' claims that Commerce erred in deducting export taxes was squarely before Commerce. Commerce, in fact, included three pages of analysis of the 2006 SLA in the IDM, where the issue was listed as a "general issue."[120] Further, mandatory respondent Tolko argued that the export taxes were specifically designed and implemented to offset the CVD duties arising from the prior softwood lumber CVD investigation and resulting order, and Commerce should not have deducted the export taxes which replaced the AD/CVD duties.

The Parties were not required to cite *Almond Bros.* in order to rely on it as authority here because the case is not relied upon to demonstrate an underlying fact - nor could it be. The relevant facts for Commerce's analysis relate to the 2006 SLA itself and the Parties' contentions, as summarized in the IDM. As noted below, the Panel does not find *Almond Bros.* particularly instructive here; however, as a matter of law, the Panel may consider the case law authority.

B. COMMERCE MISAPPLIED THE STATUTORY MANDATE WHEN IT DEDUCTED THE EXPORT TAXES THAT WERE PAID UNDER THE SLA.

Having found the export tax deduction properly before the Panel on appeal, the Panel must consider the parties' arguments regarding Commerce's treatment of export taxes in view of the 2006 SLA and arguments in the proceeding below.

[119] *See, e.g., Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (upholding exhaustion after finding that the futility exception did not apply).
[120] IDM, at 76-79 (Comment 20).

i. THE STATUTE CONTAINS MANDATORY LANGUAGE THAT GOVERNS THE DEDUCTION.

Consistent with the statute, Commerce is required to make adjustments to EP and CEP prior to comparing such prices to normal value in the antidumping calculation.[121] The statute contains mandatory language that requires that EP and CEP shall be reduced by the "amount if any, included in such price, of any export tax . . . imposed by the exporting country on the exportation of the subject merchandise to the United States …."[122] However, the statute prohibits the deduction of "export taxes, duties or other charges … specifically intended to offset the countervailable subsidy received[.]"[123] While Commerce must deduct amounts for export taxes, it is prohibited from doing so if those taxes are "specifically intended to offset the countervailable subsidy received."[124] Notably, the statute does not further define or instruct on the application of this language, leaving Commerce with authority to fill necessary gaps.

Commerce determined that "[t]o satisfy this language in the Act, a party must prove to Commerce through record evidence that an export tax has specifically offset a countervailable subsidy received in order for no deduction to be applied."[125] Notwithstanding Commerce discretion under *Chevron* step two, the statute simply contains no such requirement. Commerce erroneously removed the words "intended to" and thereby imposed a burden not found within the provision, instead seeking to require respondents to demonstrate particular offsets in order to avoid the deduction.[126] The mandatory respondents may or may not be able to demonstrate specific subsidies that were offset by the export taxes paid – but that is not the threshold inquiry under the

[121] *See* 19 U.S.C. § 1677a(c)-(d); *id.* at § 1677b(a)(6)-(7).
[122] 19 U.S.C. § 1677a(c)(2)(B).
[123] 19 U.S.C. §§ 1677a(c)(2)(B), 1677(6)(C).
[124] *See id.*
[125] IDM, at 77.
[126] *See* IDM, at 77.

statute nor does Commerce cite any authority in the investigation or in this proceeding for such an exacting standard under 19 U.S.C. §§ 1677a(c)(2)(B), 1677(6)(C).

The statute itself lends no support for such a determination as it prohibits deductions for export taxes "specifically *intended to* offset the countervailable subsidy received."[127] This is not the same as requiring that export taxes "specifically offset" certain subsidies. In other words, the statutory language does not support a requirement that a respondent link export taxes to specific subsidies or that the export taxes *actually* offset any specific subsidies received. Rather, the inquiry must focus on the intent of the export taxes. Where the export taxes are "specifically intended to" offset countervailable subsidies, Commerce shall not apply the deduction.

We see no authority for the proposition that "specifically intended" must mean a singular intent. Commerce must therefore further explain its determination with respect to whether an export tax could be specifically intended to do more than one thing. The Panel notes that there is a dearth of case law on the specific statutory provision assessing the contours of "specifically intended" under 19 U.S.C. § 1677a(c)(2)(B).

The parties spent considerable time in their briefs and at the hearing on the significance of the Federal Circuit's decision in *Almond Bros.* The Panel finds the decision, at best, to contain limited *dicta* that confirms what is already facially clear from the SLA itself - namely, that the SLA does not expressly state its purpose and that the SLA sought broadly to resolve all pending disputes between the United States and Canada.

[127] 19 U.S.C. § 1677(6)(C).

ii. A REMAND IS APPROPRIATE FOR COMMERCE TO CONSIDER THE RECORD WITHIN THE CORRECT STATUTORY FRAMEWORK.

The Panel finds that Commerce sought to impose a burden not found in the plain language of the statute, and therefore the inquiry ends there and a remand is appropriate for Commerce to reconsider and assess the issues above. In so doing, Commerce should also consider what authority it has for the proposition that export taxes must *completely* offset the amount of a net subsidy in order to satisfy the statutory language of "specifically intended to offset a countervailing subsidy" or that the SLA can simultaneously have more than one specific intent.

These issues are of particular importance given that the statutory prohibition against the deduction of export taxes specifically intended to offset a countervailable subsidy is to avoid a double remedy, which would, in theory, occur if the respondents were subject to both an export tax that is intended to offset a countervailable subsidy *plus* a lower EP and/or CEP that would increase the AD margin by reason of the same export tax.[128] In *Wheatland Tube* and *Apex Exps.,* the Federal Circuit affirmed Commerce's determination not to deduct safeguard and antidumping duties, respectively, from export price, in calculating a respondent's dumping margin, where an antidumping duty applied to the imported merchandise, and inclusion of the duties would improperly lead to the collection of a double remedy.[129]

Commerce determined that the export taxes paid under the SLA were not intended to offset subsidies but more is required before this Panel could sustain that result. The Panel therefore remands this issue to Commerce to reconsider the treatment of export taxes in the EP and CEP calculation, and specifically consider what authority it has to read section 1677a(c)(2)(B) and

[128] *See Wheatland Tube Co. V. United States,* 495 F.3d 1355, 1363 (Fed. Cir. 2007); *see also Apex Exps. V. United States,* 777 F.3d 1373 (Fed. Cir. 2015).
[129] *Wheatland Tube*, 495 F.3d at 1363; *Apex Exps*., 777 F.3d at 1280.

1677(6)(C) as requiring a demonstration of specific offsets, rather than a specific intent to offset, countervailable subsidies.

VI. COMMERCE'S EXCLUSION OF CERTAIN COSTS ASSOCIATED WITH THE PERMANENT CLOSURE AND SALE OF COMPLETE PRODUCTION FACILITIES FROM TOLKO'S G&A EXPENSE CALCULATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS IN ACCORDANCE WITH LAW.

At issue is Commerce's treatment of the sale or closure of three of Tolko's facilities during the POI – the closure and subsequent sale of the Manitoba Kraft Paper Mill, the sale of the Manitoba Solid Wood Sawmill, and the closure of the Nicola Valley Sawmill – and whether the costs associated with these occurrences should be included in Tolko's G&A expense ratio for the purpose of calculating its dumping margin.

Section 1677b(b)(3)(B) of the Tariff Act of 1930 provides that, for purposes of calculating a dumping margin, the cost of production shall include "an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question."[130] The statute does not include a definition of what costs should be included in a company's G&A expenses, and Commerce has broad discretion in calculating a respondent's G&A expenses.[131] In calculating a company's G&A expense ratio, Commerce uses the company-wide G&A expenses incurred by the producing company allocated over its company-wide cost of goods sold.[132]

The parties before this Panel put forward two theories of Commerce's "typical" practice in determining what costs should be included in the G&A expense ratio. Commerce and Tolko argue

[130] 19 U.S.C. § 1677b(b)(3)(B).
[131] *See Solvay Solexis S.p.A. v. United States*, 628 F. Supp. 2d 1375, 1379 (Ct. Int'l Trade 2009).
[132] *E.g.*, *Silicon Metal from Norway: Affirmative Final Determination of Sales at Less Than Fair Value, Final Determination of No Sales, and Final Determination of Critical Circumstances*, 83 Fed. Reg. 9,829 (Dep't Commerce Mar. 8, 2018) and accompanying IDM at Comment 3.

that Commerce acted consistently with its practice by excluding the sale of fixed assets from Tolko's G&A expense ratio because these costs do not relate to the normal, ongoing operations of the company.[133] The COALITION argues that Commerce acted inconsistently with its practice because it relied on Tolko's consolidated financial statement rather than its unconsolidated financial statement.[134]

This Panel is prohibited from reweighing the evidence presented to Commerce, and it is impermissible for the Panel to substitute its judgment for that of the decision-maker. Rather, and as discussed above, it is the responsibility of this Panel to decide whether Commerce's determination was supported by substantial evidence and in accordance with the law. We find that it was.

It is Commerce's longstanding practice to exclude the sale of fixed assets from a company's G&A expense calculation because they do not relate to the normal, ongoing operations of the company.[135] Commerce explained that it reviewed the evidence presented and determined that the three transactions at issue do not relate to the normal, ongoing operations of the company. Commerce reviewed Tolko's unconsolidated financial statement and, because that financial statement did not contain notes, looked at the relevant descriptions contained in its consolidated financial statement to determine the nature of the transactions. As Commerce noted in its brief, "Tolko is in the business of producing softwood lumber, not selling production facilities, and, thus, the permanent closure and sale of the production facilities is not related to Tolko's general business

[133] *See* Commerce Rule 57(2) Brief, at 92-99; Tolko Rule 57(2) Brief, at 20-29.
[134] COALITION Rule 57(1) Brief, at 11-12.
[135] *See Thai Plastic Bags Industries Co., Ltd. v. United States*, 949 F. Supp. 2d. 1298, 1302-03 (Ct. Int'l Trade 2013).

operations."[136] Even the COALITION's brief notes that Commerce normally excludes the closure and sale of entire production facilities from G&A expenses.[137]

Nonetheless, the COALITION argues that Commerce should have included the sale or closure of three of Tolko's facilities in the G&A expense ratio because Commerce's practice is to look at the unconsolidated financial statements of the producing company, rather than the consolidated financial statements, and Tolko's unconsolidated financial statements include the costs from the sale or closure of the three facilities as "other expenses," thereby indicating to the COALITION that Commerce should include these costs in the G&A expense ratio.[138] The COALITION does not point to any authority for the proposition that Commerce cannot rely upon evidence extraneous to an unconsolidated financial statement in determining what adjustments to make in computing a G&A expense ratio. While doing so, in another case with different facts, may be unreasonable, it is not unreasonable here, as Commerce was following its undisputed precedent of excluding the sale of fixed assets from a company's G&A expense ratio.

Accordingly, we find that Commerce's exclusion of Tolko's sale or closure of three facilities during the POI from the calculation of Tolko's G&A expense ratio to be supported by substantial evidence on the record and in accordance with the law.

VII. RESOLUTE SPECIFIC ISSUES

A. RESOLUTE'S STARTUP ADJUSTMENTS

Resolute asserts that Commerce incorrectly determined that neither the Atikokan nor the Ignace mills meets the statutory criteria for a startup adjustment under section 773(f)(1)(C)(ii) of the Tariff Act for new or substantially retooled facilities whose production capacities were limited

[136] Commerce Rule 57(2) Brief, at 93.
[137] COALITION Rule 57(1) Brief, at 13.
[138] *Id*. at 11-12.

by technical factors during the POI.[139] The Panel upholds Commerce's Final Determination that the Ignace mill is not entitled to a startup adjustment but remands the determination that the Atikokan mill is not entitled to a startup adjustment.

i. BACKGROUND

With respect to the Atikokan mill, Commerce determined that it was a new production facility, meeting the first of two statutory criteria contained in section 773(f)(1)(C) for the startup adjustment.[140] However, Commerce determined that "Atikokan's monthly production data did not support a startup period that extends through the entire period of investigation" from October 2015 through September 2016.[141] Accordingly, Commerce denied the startup adjustment for the Atikokan mill. In response, Resolute claims that production at the Atikokan facility was limited by technical factors through August 2016 such that Atikokan produced less than 50% of its capacity during the POI.[142]

The Ignace sawmill was shut down in 2006 and remained shut down until 2015, resulting in the removal of some equipment and the deterioration of other equipment during that time period.[143] Commerce determined that the Ignace facility did not qualify as a "new production facility" because it had not been substantially retooled as required for the startup adjustment.[144] Resolute disputes that conclusion, contending that the Ignace mill constitutes a substantially complete retooling of an existing plant where production was limited by technical factors associated with that retooling through March 2016.[145]

---

[139] Resolute Rule 57(1) Brief, at 4.
[140] The parties do not dispute that the Atikokan mill is a "new production facilit[y]," meeting the first statutory criteria for the startup adjustment contained in section 773(f)(1)(C)(i) of the Act. Accordingly, that issue is not on appeal.
[141] IDM, at 90.
[142] Resolute Rule 57(1) Brief, at 6.
[143] *Id.* at 7.
[144] IDM, at 91.
[145] Resolute Rule 57(1) Brief, at 6.

In making its determination, Commerce acknowledged that restarting a long dormant facility like Ignace takes considerable effort and that Resolute installed a completely new kiln and green energy system at the Ignace mill.[146] However, Commerce found "that installation of a single processing stage at a mill, though a significant investment, does not equate to an entirely new facility" because the [Statement of Administrative Action or "SAA"] requires "substantial retooling, [which] involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery."[147]

As with the Atikokan facility, Commerce also determined that the Ignace facility failed to satisfy the second statutory criterion because any limitation in production levels due to startup-related technical factors was over prior to the POI.[148] Commerce also rejected Resolute's submitted startup adjustments because they are based on budgeted, rather than actual, figures.[149]

With respect to the second factor regarding whether technical factors limited production, Commerce stated that during the Resolute cost verification, Commerce reviewed the various technical problems that Resolute experienced with the commencement of production operations at both the Atikokan and Ignace mills.[150] Commerce acknowledged that Resolute experienced technical issues at both facilities, but disagreed that these technical issues limited production levels during the initial phase of commercial production.[151] Commerce based its determination on a review of the log inputs at all of Resolute's sawmills, *i.e.*, those sawmills that Resolute argued were in a startup phase and those which inarguably were not.[152] Commerce relied on this data because it believed that log inputs represented the best measure of the sawmills' ability to produce

[146] IDM, at 90-91.
[147] *See* Statement of Administrative Action (SAA) accompanying the URAA, H.R. Rep. No. 103-316 (1994), at 836.
[148] IDM, at 91.
[149] *Id.* at 91.
[150] *Id.* at 91.
[151] *Id.*
[152] *Id.*

at commercial production levels and reflected consideration of historical data concerning Resolute's experience producing the subject merchandise.[153] Commerce concluded that log input data was most responsive to the language of the SAA directing Commerce to measure the "units processed."[154] Based on its analysis of this record evidence, Commerce found that both mills reached the SAA's definition of commercial production levels prior to the start of the POI.[155] Accordingly, Commerce denied Resolute's claim for startup adjustments at the Atikokan and Ignace mills.

ii. **ANALYSIS**

Section 773(f) of the Tariff Act sets forth special rules for the calculation of cost of production and constructed value. Of relevance here, subparagraph (1)(C) of section 773(f) states:

> Startup Costs –
> (i) In general – Costs shall be adjusted appropriately for circumstances in which costs incurred during the time period covered by the investigation or review are affected by startup operations.
> (ii) Startup operations – Adjustments shall be made for startup operations only where—
> (I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and
> (II) production levels are limited by technical factors associated with the initial phase of commercial production.
>
> For purposes of subclause (II), the initial phase of commercial production ends at the end of the startup period. In determining whether commercial production levels have been achieved, the administering authority shall consider factors unrelated to startup operations that might affect the volume of product processed, such as demand, seasonality, or business cycles.[156]

Because section 773(f)(1)(C) uses the word "and", Resolute bears the burden of demonstrating that both the criteria listed in subparagraphs (i) and (ii) are met for a startup

[153] *Id.*
[154] *Id.*
[155] *Id.* at 92.
[156] Tariff Act of 1930, section 773(f)(1)(C), 19 U.S.C. § 1654.

operations adjustment to be made.

The SAA clarifies that the term "new production facilities" may also include startup operations involving "the substantially complete retooling of an existing plant" which involves "the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery."[157] Thus, an adjustment for startup costs is warranted only in those circumstances wherein the renovations result in a nearly new facility.

The SAA also provides guidance regarding how to determine whether production levels are limited by technical factors associated with the initial phase of commercial production. In this regard, the SAA states:

> To determine when a company reaches commercial production levels, Commerce will consider first the actual production experience of the merchandise in question. Production levels will be measured based on units processed. To the extent necessary, Commerce also will examine other factors, including historical data reflecting the same producer's or other producers' experiences in producing the same or similar products. A producer's projections of future volume or cost will be accorded little weight, as actual data regarding production are much more reliable than a producer's expectations.

Thus, the SAA directs the Department to consider the "actual production experience of the merchandise in question" as measured by the "units processed" to determine whether "commercial production levels" have been reached, indicating the end of the startup period. Furthermore, the SAA instructs that "the attainment of peak production levels will not be the standard for identifying the end of the start-up period, because the start-up period may end well before a company achieves optimum capacity utilization."[158]

---

[157] *See* Statement of Administrative Action (SAA) accompanying the URAA, H.R. Rep. No. 103-316 (1994), at 836, 1994 U.S.C.C.A.N. 4040, 4173. Congress has instructed that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[158] SAA at 836.

1. COMMERCE REASONABLY DETERMINED THAT THE IGNACE MILL IS NOT A NEW PRODUCTION FACILITY.

Applying the statutory language and guidance of subparagraph ii(I), the Panel finds that Commerce acted reasonably in determining that the Ignace mill is not a new production facility because there was not a "substantially complete retooling of an existing plant" such that it should be considered a new production facility within the meaning of the statute. While Resolute did replace or rebuild some major pieces of equipment, the SAA sets a high bar requiring that "nearly all production machinery" be replaced or rebuilt. The record evidence supports Commerce's conclusion that this standard was not met.[159] In refuting this conclusion, Resolute relies primarily on the replacement of a drying kiln, but Commerce correctly determined that replacement of one piece of machinery used in one stage of production is not the same as "replacement of nearly all production machinery" as required by the SAA. Resolute also argued that it replaced other equipment during the startup process, but Commerce's verification shows that the subject equipment was replaced 1-2 years after the restart of the Ignace facility and thus constituted improvements to an existing operation, not replacement or rebuilding of "nearly all" of the production machinery during the startup period.[160] Finally, Resolute did not provide information that would allow a comparison of the expenses it incurred in restarting the Ignace mill as compared to what it would have cost if Resolute had built an entirely new facility at Ignace.[161] For these

[159] This decision accords with Commerce's prior treatment of this issue. *See, e.g., Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews*, 64 Fed. Reg. 12927, 12950 (Dep't Commerce Mar. 16, 1999) (Commerce denied a startup adjustment for a new production line stating that substantial modifications must be made to the total production process); *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part*, 70 Fed. Reg. 7237 (Dep't Commerce Feb. 11, 2005) (Commerce found that the respondent's replacement and retooling of a significant amount of equipment did not warrant a startup adjustment since it did not include substantial modifications to the entire production plant).

[160] Resolute Cost Verification Report, (C.R. 1384), at 32-33.

[161] *See* Hearing Transcript, June 7, 2023, 27-29.

reasons, the panel finds that Commerce acted reasonably in denying a startup adjustment for the Ignace mill.[162]

2. COMMERCE MUST EXPLAIN WHY MEASURING LOG INPUTS SATISFIES THE LANGUAGE OF THE SAA.

The second factor under subparagraph ii(II) is whether "production levels were limited by technical factors associated with the initial phase of commercial production."[163] Under the *Chevron* doctrine, we first ask whether Congress has spoken directly to the issue.[164] If so, Congress' intent must be given effect. If not, the agency has discretion to interpret ambiguous statutory language and the agency interpretation will be upheld as long as it is reasonable.

In this case, the statute does not define the phrase "production levels." However, the SAA provides authoritative guidance of congressional intent as to the meaning of this phrase. In this regard, the SAA instructs Commerce to consider "the actual production experience of the merchandise in question," here, softwood lumber. The SAA also instructs that "[p]roduction levels will be measured based on units processed." Further, the SAA allows Commerce to take into account other factors, such as historical production data, to the extent necessary.

In the IDM, Commerce states that "a review of log inputs . . . represents . . . the sawmills' ability to produce at commercial production levels."[165] While we recognize that Commerce has discretion to interpret and apply the statute, Commerce must provide a reasonable explanation for its position. Here, Commerce has not adequately explained why "log inputs" should be equated with "units processed" or "production levels" as required by the SAA nor has Commerce provided

[162] In light of the panel's conclusion that the Ignace mill is not a new production facility, it is not necessary to address the second factor regarding the existence of technical factors that limited production with respect to the Ignace facility. That discussion is only relevant to the Atikokan facility.
[163] Tariff Act of 1930, §773(f)(1)(C), 19 U.S.C. § 1654.
[164] *Chevron,* 467 U.S. at 837.
[165] Final IDM at 105 .

any persuasive or binding legal precedent for the approach it took in this case. A common dictionary definition of "process" is "a series of actions [taken] in order to achieve a result."[166] Consideration of the number of inputs into a production process takes into account only one static factor in a process, not a series of actions taken to produce the resulting product(s), *i.e.*, softwood lumber. It is possible that more logs were needed at the start of the operation to fine tune the manufacturing process and that many of the logs were not fully processed or that the resulting lumber products produced in the early stages were not commercially marketable due to some defect in the production process. In fact, Commerce acknowledged in the Resolute Cost Verification Report that there were technical issues including a planer that produced a number of broken pieces that were not marketable products.[167] However, Commerce did not fully explain why these technical issues were not sufficient to limit production.

The plain language of the SAA when read in context requires Commerce to consider "units processed" when measuring "production levels". Commerce appears to treat the phrase as "units *to be* processed" rather than the phase as written, "units processed". The word "processed" is used in the past tense suggesting that the action of processing should be complete. Thus, the statute directs Commerce to measure the quantity of the subject merchandise produced or "commercial production levels," which may not be the same as raw material inputs. If it is not possible to measure the amount of the subject merchandise processed, Commerce should explain why that is the case and why using log inputs is the best substitute. In its IDM, Commerce asserts that the monthly quantities and values of the logs started through production . . . suggest that, by the beginning of the POI, Resolute had sufficient confidence in the Atikokan and Ignace sawmills to

[166] *Process,* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/process (2023). *See also process,* Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/process (2023).
[167] Resolute Rule 57(1) Brief at 26.

devote significant raw material resources to produce there." However, Commerce does not explain how "logs started through production" is the same as "units processed" or how that data equates to production levels. As noted above, a log started through production may not complete the production process and become part of the mill's commercial production capacity because of technical difficulties experienced during the production process itself.

There appears to be little prior case law on this issue to assist the Panel. Commerce relies on a single court case, *Agro Dutch Foods Ltd. v. U.S.*[168] in support of its interpretation of the statute. *Agro Dutch* is a decision from the CIT and, as such, is not binding on the Panel. In addition, while the CIT upheld Commerce's determination with respect to start-up costs in *Agro Dutch*, the Panel finds that *Agro Dutch* is distinguishable and, thus, is not sufficiently persuasive authority either.

In *Agro Dutch*, Commerce explained that it interpreted the term "units processed" to be "how many units Agro Dutch set out to produce."[169] As an initial matter, the number of units a producer intends to produce is different from the number of inputs, which was the measure Commerce used in the present case. Second, the producer in *Agro Dutch* provided insufficient evidence to support its claim that there were technical factors limiting its production levels.[170] Agro Dutch provided total output of the subject merchandise (mushrooms) in kilograms and yield rates expressed in percentages. However, it failed to provide information on its inputs thus preventing the establishment of a benchmark against which Commerce could evaluate the evidence it received. Thus, there was a question of fact at issue in *Agro Dutch* in addition to the legal interpretation regarding the meaning of the statute that is at issue here. Third, Agro Dutch

[168] *Agro Dutch Foods Ltd. v. United States*, 110 F. Supp. 2d 950 (Ct. Int'l Trade, 2000).
[169] *Id.* at 955.
[170] *Id.*

contended that Commerce should have used a test that considered mushroom output yields and that its yield rates in its new, more efficient growing rooms during the claimed startup period were significantly lower than in its preexisting rooms.[171] Agro Dutch further argued that total output and yield rates fall under "other factors" that the SAA permits Commerce to consider. While this argument may come closest to the argument made in the present case, it is still inapposite because Agro Dutch was relying on improvements in efficiency in making its argument, which the SAA indicates are not to be considered.[172] In the present case, Resolute is not comparing new, more efficient equipment to older equipment; rather, Commerce compared production starts at all of Resolute's mills during the POI.[173] Although Commerce previously has asserted that "production starts is the best measure of a facility's capability to produce at commercial production levels," Commerce has not yet adequately explained in prior case law or here why it believes that to be true or how this conclusion is consistent with the language of the statute and the SAA.[174]

For these reasons, the Panel remands this issue to Commerce to provide a better explanation as to why measuring log inputs at the Atikokan mill satisfies the SAA's requirement to measure "production levels" using "units processed" when determining whether a startup adjustment is appropriate. [175]

---

[171] *Id.*
[172] SAA, at 836.
[173] *See* Commerce Rule 57(2) Public Reply Brief, at 112.
[174] *See, e.g.*, *Brass Sheet and Strip from the Netherlands, Notice of Final Results of Antidumping Duty Administrative Review, and Determination Not to Revoke the Antidumping Duty Order*, 65 Fed. Reg. 742, 745 (2000).
[175] Chairman Pickard respectfully dissents from the majority opinion in regard to this issue. Recalling the deferential standard to be employed by this Panel, he finds Commerce's determination to be supported by substantial evidence and otherwise in accordance with law. As Congressional intent as to how Commerce is to examine production levels is not clear, the Chairman finds that Commerce's analysis which focuses on production starts (in effect, lumber inputs in its analysis of units processed) falls within the bounds of a "reasonable interpretation."

The majority notes that it is possible that more inputs could have been needed to fine tune the manufacturing process and also acknowledges that Commerce did not provide an explanation based in prior caselaw to support its decision.

B. BY-PRODUCT OFFSET

At issue is Commerce's refusal to include part of the by-product offset submitted by Resolute for sawdust generated by the Thunder Bay sawmill. The Panel affirms Commerce's determination in this respect.

The fact that an offset in the cost calculation is granted by Commerce for sawdust as a by-product is not in issue. The question is its extent.

For the Thunder Bay mill, Resolute has asked for two offsets for its sawdust by-product. The first offset, which is uncontested, is for the value of the sawdust as recorded in the normal books and records of the Thunder Bay sawmill. The second additional offset is for net profit as recognized in the normal books and records of the Thunder Bay pellet mill in relation to the sawdust used to create pellets.

The question is whether it was in accordance with law for Commerce to refuse this additional offset for the value of a further processed by-product, where the value of the joint products (the sawdust and the other products used to create the pellets) can be separately identified and valued objectively at the split-off point (when the sawdust leaves the sawmill) before they enter the further processing stage (at the pellet mill).

It is not contested that there may have been other more reasonable analytical approaches in the examination of the extent to which production levels were, or were not, limited by technical factors associated with an initial phase of commercial production. However, that is not the role of this Panel. Rather our review is essentially to determine whether an examination of production starts in the context of the "actual production experience" of the relevant producer is unreasonable. In light of the deferential standard to be employed by this Panel, and being mindful that Resolute bears the burden of proving the application of Section 773(f), Chairman Pickard finds that Commerce acted reasonably, and accordingly does not concur in the determination to remand this issue to the agency.

Resolute's position is that this additional offset is justified because of special circumstances arising at Thunder Bay, where it has two mills, a sawmill and a pellet mill. According to Resolute, this would increase the value of the sawdust by-product arising from the sawmill. That is because the sawdust does not need to be transported and can be transformed into pellets essentially onsite, at the other Thunder Bay mill. As such, Resolute's position, in essence, is that solely looking at the books and records of the sawmill, in respect of sawdust value, is not in accordance with law because it is not a reasonable reflection of the costs associated with the production of the sawdust under consideration, for the purposes of an offset.

Commerce states that as a matter of discretion it offsets normal value for the value of by-products generated during the production of "*subject merchandise*" within the POI or review.[176]

The statute does not expressly provide a specific methodology for valuing by-products.[177] Commerce nonetheless points to 19 U.S.C. § 1677b(f)(1)(A) in respect of the cost of production, which requires it to "*normally*" rely on the records of the exporter or producer, "*if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise*." As such, Commerce states its practice "*is to adhere to a company's normally recorded costs where these statutory criteria are met*"[178].

Commerce made the following findings:[179]

[176] Commerce Rule 57(2) Brief, Commerce, at 117; IDM, Comment 44, at 101.
[177] *Zhejiang Sanhua Co. v. United States*, 61 F.Supp.3d 1350, 1353 (Ct. Int'l Trade, 2015); *Tianjin Magnesium Int'l Co. v. United States*, 722 F.Supp.2d 1322, 1334 (Ct. Int'l Trade, 2010).
[178] IDM, Comment 44, at 101.
[179] IDM, Comment 44, at 101.

- Resolute's records are kept in accordance with generally accepted accounting principles (GAAP);
- Resolute maintains separate accounting records, *i.e.*, a general ledger, trial balance, variance analysis reports, and lumber operating reports for the Thunder Bay sawmill and for the Thunder Bay pellet mill;
    - These mill-specific accounting records ultimately roll up into the GAAP-based consolidated financial statements prepared by the ultimate parent of the Resolute companies;
    - The mill-specific accounting records for the Resolute sawmills were the basis for the reported costs;
- Resolute normally offsets the Thunder Bay lumber production costs by the market value of the sawdust that is generated at the sawmill and not by net realizable value (NRV) reflecting further processed wood pellets produced in the pellet mill;
- In its response to Commerce, Resolute lists the addition of the pellet mill net profit to its reported Thunder Bay lumber costs as a departure from "*the costs as normally stated for the Thunder Bay (sawmill)*";
- Resolute normally treats sawdust as a by-product.

The question is whether it is in accordance with law for Commerce to have relied on the books and records of the sawmill, without further accepting the additional requested offset, which Resolute states actually reflects the costs of this by-product.

Resolute's position is that Commerce departed from its past practice in determining the value of the sawdust by-product.[180] Resolute cites to practice from Commerce which states that

[180] Resolute Rule 57(1) Brief, at 33.

"*by-products are assigned an accounting value called net-realizable value, which is their sales value, less the cost of selling them*."[181] Resolute thus states that by-products "*should be valued based on the actual revenues from the sale of those specific by-products even when further processed before sale, minus any further manufacturing or selling expenses*."[182]

Resolute argues that Commerce chose incomplete and thus inaccurate information to determine the value of the sawdust by-product. Resolute also takes the position that Commerce's determination is contrary to law because Commerce was not free to disregard transactions between affiliated parties in the determination of value of the by-product, citing to 19 U.S.C. § 1677b(f)(2).[183]

At the hearing, Resolute was asked for the best caselaw or practice in support of its position that NRV applied to the valuation of by-product in any event, notably because any relevant affiliated transaction should not be disregarded. Counsel for Resolute referred to *Citric Acid and Certain Citrate Salts from China*.[184] However, in determining whether high protein scrap was to be found a "*co-product*" in that case, Commerce stated five factors, including how the company allocates such costs in its books and records, and concluded that "*no single factor is dispositive of our determination*."[185] Commerce clearly left itself a significant amount of discretion in reaching what it considers is the best way to achieve the purpose of the statute (*i.e.,* assessing costs appropriately and in the process offsetting the value of by-products), stating that the various factors

---

[181] *Ibid*, citing to *Certain Orange from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 46,584 (Dep't Commerce Aug. 11, 2008) and accompanying Issues and Decision Memo, at Comment 8.
[182] Resolute Rule 57(1) Brief, at 33-34.
[183] ("*A transaction … between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.*")
[184] Hearing Transcript, Day 2 (Confidential), at 14, lines 9-11.
[185] *Citric Acid from the People's Republic of China*, Issues and Decision Memo, December 7, 2015, Comment 11, at 30.

were simply to be considered and weighed, in the light of the circumstances. This is consistent with the fact that Commerce has no specific guidance in the statute on the valuation of by-products (or co-products) and that Commerce must otherwise decide how to best to fill any such void. Commerce has done so by pointing to 19 U.S.C. 1677b(f)(1)(A) and related practice. Further, disregarding transactions between affiliated persons is something Commerce "*may*" do under 19 U.S.C. 1677b(f)(2), a provision explicitly allowing it to exercise discretion. Considering there is no specific guidance on by-products themselves, these other provisions are relevant in the application, by Commerce, of how it best sees the objectives of the statute are to be fulfilled, in the light of its practice and any reasoned explanations as to why any such practice should change, generally or in the circumstances. In the circumstances, the Panel affirms Commerce's determination. It does so notably in the light of Commerce's discretion, its reasoned approach, and the fact Resolute, in its Canadian GAAP-based books and records, normally offsets the Thunder Bay lumber production costs by the market value of the sawdust that is generated at the sawmill and not by net realizable value (now claimed) reflecting further processed wood pellets produced in the pellet mill.

C. G&A EXPENSES

i. RESOLUTE DID NOT FAIL TO EXHAUST ITS ADMINISTRATIVE REMEDIES AT COMMERCE.

Commerce argues that this Panel should not reach the issue of the calculation of Resolute's G&A expenses on the merits because Resolute failed to exhaust its administrative remedies before Commerce.[186] Resolute claims that it did not fail to exhaust administrative remedies because

[186] Commerce Rule 57(2) Brief, at 123-26.

Commerce changed its treatment of certain G&A expenses between the Preliminary and Final Determinations and that, prior to the Final Determination, "there was no issue to remedy."[187]

We find that Resolute did not fail to exhaust its administrative remedies at Commerce. The CIT has not required that a plaintiff raise an issue in an administrative case brief where Commerce changed its calculations between the Preliminary and Final Determinations.[188] In some circumstances, a party may be required to anticipate a potential change by Commerce,[189] but that is not the case here. We find this issue eligible for appeal.

ii. COMMERCE'S DETERMINATION TO INCLUDE IN THE CALCULATION OF RESOLUTE'S G&A EXPENSE RATIO CERTAIN EXPENSES INCURRED BY RFP IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH THE LAW.

In calculating cost of production, Commerce is required by the statute to include "an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question."[190] The statute does not speak directly to what costs should and should not be included as G&A for purposes of calculating cost of production. It is Commerce's practice to treat "G&A expenses incurred for the

[187] Resolute Rule 57(3) Brief, at 31-32.
[188] *Shantou Red Garden Foodstuff Co. v. United States*, 815 F. Supp. 2d 1311, 1334 (Ct. Int'l Trade 2012) ("Because the ultimate composition of the financial statements appeared in the Final Determination but not in the Preliminary Determination, and because the resulting surrogate values were different, the court hears Red Garden's claim.")
[189] The panel is aware that the Federal Circuit has previously found that in certain circumstances where the parties failed to exhaust their arguments before Commerce that it was an abuse of discretion for the CIT to waive the exhaustion requirement. *See e.g., Boomerang Tube LLC v. United Stated,* 856 F. 3d 908 (Fed. Cir. 2017). The Court in that case found legal error in the decision below to the extent that it stood for the proposition that Commerce must expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations. The Panel here makes no such similar decision. In addition, the Court in *Boomerang* noted that the decision to waive exhaustion was based on a clearly erroneous finding of material fact by the CIT in determining that the parties did not have an opportunity to raise their objection as the relevant issue. The holding in *Boomerang* rested on the determination that the CIT's decision with respect to waiver was based upon legal error, which the Panel does not make, and a clearly erroneous finding of material fact, which does not exist before this Panel.
[190] 19 U.S.C. § 1677b(b)(3)(B).

operation of the corporation as a whole and not directly related to the manufacture of a particular product."[191]

Resolute claims that Commerce should not have included certain of RFP expenses in the calculation of Resolute's G&A expense ratio, because RFP is not a producer or exporter of subject merchandise.[192] This claim is directly controverted by Commerce's practice.

Commerce acted consistent with the statute and its practice in determining to include in the calculation of Resolute's G&A expense ratio certain expenses incurred by RFP. In instances where the respondent's parent company is a holding company, and the parent incurs expenses on the respondent's behalf, Commerce normally will allocate those expenses to the respondent's G&A expense ratio.[193] The CIT has affirmed this practice.[194]

There is substantial evidence to support Commerce's Final Determination to include certain of RFP's expenses in Resolute's G&A expense ratio. RFP is Resolute's publicly traded parent company and, by definition, is part of the exporter.[195] Resolute submitted information from RFP's accounting system for each legal entity that is included in RFP's consolidated audited financial statement for FY 2016, and Commerce determined that RFP had certain corporate-level expenses that it did not allocate to its subsidiaries.[196] Consistent with its practice, Commerce adjusted Resolute's G&A expense ratio to include the expenses from RFP's financial statement that had not already been allocated to Resolute. These determinations were consistent with the evidence presented at Commerce. It is not the role of this Panel to reweigh that evidence.

---

[191] *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 340-41 (Ct. Int'l Trade Jan. 27, 1999).
[192] *See* Resolute Rule 57(1) Brief, at 29-32.
[193] *See Certain Pasta From Italy*, *Notice of Final Results of New Shipper Review of the Antidumping Duty Order*, 69 *Fed. Reg.* 18,869 (Dep't Commerce Apr. 9, 2004) and accompanying Issues and Decision Memo, at Comment 6.
[194] *See Floral Trade Council*, 41 F. Supp. 2d at 341.
[195] *See* Resolute Rule 57(3) Brief, at 32.
[196] *See* Resolute Section D Questionnaire Response (C.R. 147), at D-50; Resolute Cost Verification Report (C.R. 1384), at 12.

Accordingly, we find that Commerce's inclusion of certain of RFP's expenses in the calculation of Resolute's G&A expense ratio to be supported by substantial evidence on the record and in accordance with the law.

VIII. ORDER OF THE PANEL

For the reasons set out above, the Panel **AFFIRMS**:

1. Commerce's decision on scope
2. Commerce's decision on Tolko's G&A expenses
3. Commerce's decision on startup adjustments for Resolute's mill at Ignace
4. Commerce's decision on Resolute's by-product offset
5. Commerce's decision on Resolute's G&A expenses

For the reasons set out above, the Panel **REMANDS** for further explanation consistent with our decision:

1. Commerce's differential pricing methodology
2. Commerce's treatment of 2006 SLA export taxes
3. Commerce's decision on startup adjustments for Resolute's mill at Atikokan (Chairman Pickard dissenting)

Commerce shall file its Decision on Remand by January 12, 2024.

SO ORDERED

Issue Date: October 5, 2023

Signed in the original by:

/s/ Daniel B. Pickard
Daniel B. Pickard, Chairman

/s/ Cindy G. Buys
Cindy G. Buys, Panelist

/s/ Maureen Irish
Maureen Irish, Panelist

/s/ Pierre-Olivier Savoie
Pierre-Olivier Savoie, Panelist

/s/ Christine M. Streatfeild
Christine M. Streatfeild, Panelist